No. 89-346

In the Supreme Court of the United States

OCTOBER TERM, 1989

ALASKA AIRLINES, INC. and USAir, Inc.,

Petitioners,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does either the Commerce Clause or the Due Process Clause preclude a state in which an interstate airline owns property from using the flight time of airplanes that do not land in the state, as well as the flight time of those that do, in determining the portion of that airline's property located in the state?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, the Department of Revenue of the State of Oregon (DOR), accepts, as adequate for review, petitioners' statement of the opinions below, jurisdiction and constitutional provisions involved. DOR accepts petitioners' statement of the case with the exception of the first sentence, which suggests that DOR taxes interstate aircraft merely because they have flown over Oregon. The reasons for DOR's disagreement with that suggestion are set out in detail below.

REASONS FOR DENYING CERTIORARI

Petitioners assert this case presents three issues that make it worthy of this Court's attention. First, they contend the Oregon taxing formula considers property with no nexus to the state. Second, they assert the existence of a conflict among the state courts that have considered the issue. Finally, they claim that failure to strike down Oregon's formula will have an adverse financial impact on the airline industry. None of these contentions withstands analysis.

The issue of the existence or extent of a nexus—the issue on which the airlines lay the most stress—is not presented by this case at all. Rather, the case presents solely a question of fair apportionment of the mobile property of interstate airlines having an acknowledged nexus with Oregon. The airlines' claim of a conflict among the states is no more substantial. Like the first argument, it depends on the airlines' erroneous focus on nexus. Neither of the two decisions on which the airlines rely considered the question presented by the facts of this case. Finally, the claim that the Oregon formula will increase the airlines' overall tax burden depends on the erroneous assumption that the value Oregon currently reaches by the application of that formula would otherwise be untaxable by any state. This argument is contradicted by petitioners' own claim that the Oregon formula will subject them to double taxation and is incorrect in light of this Court's

decisions. Properly viewed, the case involves nothing more than a fact-specific application of this Court's settled principles. It does not present any significant legal issue meriting the Court's attention.

I. OREGON'S SYSTEM OF APPORTIONING THE VALUE OF AIRLINE MOBILE PROPERTY DOES NOT VIOLATE EITHER THE COMMERCE OR DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

Petitioners, Alaska Airlines, Inc. and USAir, Inc., are airlines regularly doing business in the State of Oregon. In the course of conducting that regular business, as the airlines do not dispute, they own and use property in Oregon subject to ad valorem property taxation. To assess the amount of ad valorem tax these interstate corporations must pay to Oregon, DOR first determines the entire value of the airlines' property, both fixed and mobile, as a unit. Or. Rev. Stat. § 308.555 (1987). *See Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220 (1897).[1] DOR then determines what percentage of petitioners' property is located in Oregon. DOR allocates that percentage of the unit of each petitioners' property to Oregon and applies its standard ad valorem property tax rates to that apportioned percentage of the corporation's unit value.[2]

A state property tax on an interstate enterprise will avoid running afoul of the Commerce Clause of the United States

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[1] *Norfolk & Western Railway Company, et al. v. Missouri State Tax Commission*, 390 U.S. 317, 324 (1968), stands for the same proposition:

> The value [of an interstate enterprise] may be ascertained by reference to the total system of which the intrastate assets are a part.

[2] Petitioner's description of Oregon's time-based formula for apportioning mobile property of interstate airlines, (Pet. Cert. at 3) is accurate.

Constitution[3] if it (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The Due Process Clause[4] requires that the taxing state have sufficient contact with the enterprise to confer jurisdiction to tax, and that the tax be fairly apportioned to avoid taxation of extraterritorial value. *See Norfolk & Western Railway Company v. Missouri Tax Commission*, 390 U.S. 317, 323-25. The two tests, thus, have much in common.

Despite the agreement of both petitioners that their respective enterprises have a substantial nexus with the State of Oregon, and thus a taxable situs in Oregon, the airlines doggedly argue throughout their petition as if this case involved a dispute over nexus. It does not. The issue in this case is fair apportionment of a unit of interstate property that has an acknowledged taxable situs in the State of Oregon. The major thrust of this response is directed to the fundamental error of the airlines' position: the assumption that Oregon taxes individual flights or airplanes and the conclusion that, as a result, those flights or planes must have an individualized nexus with the state. Neither proposition is correct. Oregon taxes a portion of the unit of each airline's mobile property, a unit that unquestionably has a taxable situs in the state. Oregon apportions on the basis of the presence of that unit within the state.

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[3] Article I, section 8, clause 3, of the United States Constitution provides, in pertinent part:

> Congress shall have Power . . . To regulate Commerce . . . among the several States.

[4] The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Because the airlines misdirect the focus of their arguments to the issue of nexus, they address the question of fairness only indirectly. When they address it, they take the inconsistent position, on the one hand, that Oregon's system exposes them to the prospect of double taxation and, on the other, that no state may tax them for the time while they are flying over Oregon.

This brief addresses the Oregon system of apportioning mobile property of interstate airlines primarily in light of the Commerce Clause tests. That discussion also demonstrates compliance with the requirements of Due Process. In the course of that analysis, respondent addresses petitioners' assertion that cases from this Court have implicitly or expressly disapproved Oregon's system.

A. The Commerce Clause.

1. The airlines have a "substantial nexus" with Oregon.

a. Each airline, as an enterprise, has a situs in Oregon and is subject to Oregon ad valorem property taxes.

The airlines base their argument almost entirely on the fundamentally erroneous proposition that Oregon taxes individual aircraft or flights, and that each such aircraft or flight must have an individualized substantial nexus with the state to be considered in DOR's apportionment formula. That interpretation misconstrues what Oregon actually does and leads the airlines into misinterpretation of this Court's cases.

The state does not tax individual airplanes or flights, or even buildings or other ground equipment. Rather, it taxes units of property owned and used by interstate enterprises—as wholes—and bases the proportion of each whole to which it applies its tax on the percentage of that whole located in Oregon. As the Oregon Supreme Court stated:

> This premise—that the Department assessed taxes against overflights—is the fly in the airlines' ointment. The Department did not assess overflights or specific aircraft; the Department assessed each airline's aircraft property based on a formula reflecting (in part) time spent in the air by that aircraft. The validity of each airline's tax assessment does not depend upon whether the state could have assessed a tax against overflights—the state did not do so. Rather, the validity depends upon whether each airline's aircraft property was part of a *unit* with situs in this state and whether the state fairly apportioned that unit.

Alaska Airlines, Inc. v. Department of Revenue, 307 Or. 406, 411, 769 P.2d 193 (1989); Pet. Cert., Appendix A at 8a (emphasis in original).

The airlines misinterpret this Court's cases because the principles petitioners extract from those cases were developed to determine whether an enterprise has a sufficient nexus with a state to justify a state tax on the enterprise at all. Each airline tacitly acknowledges that it has a taxable situs in Oregon. *See* Pet. Cert. at 2-4. DOR is aware of no case from this Court or any other court that holds or even suggests that where an interstate enterprise has an acknowledged situs in a given state, each individual activity the state considers for purposes of apportionment must have a separate, individualized nexus with the state. Rather, the Court has required only that the apportionment formula be "fair."[5]

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[5] After a nondomiciliary State has acquired jurisdiction to impose a tax on vehicles moving in interstate commerce, . . . there frequently arises the question whether the exaction is equitably apportioned. The judicial touchstone for determining the value of the apportioned property usually is the "average physical presence within the jurisdiction." . . . Such "average presence" is designed to attribute to each taxing State its "fair share of an interstate transportation enterprise" for tax purposes. . . . That "fair share" may be regarded as the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing state.

HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 7.9, p. 396 (1981) (footnotes omitted).

b. Cases from this Court do not hold that each portion of an interstate enterprise must have a separate situs in the taxing state before it may be considered in the state's apportionment formula.

Contrary to the airlines' assertion, the Court's cases do not hold that a state may not consider flyover time in apportioning the value of a unit of mobile property with an acknowledged situs in the taxing state. Rather, those cases deal exclusively with the existence or nonexistence of a nexus between the enterprise and the state seeking to levy a tax. It is true that in the course of determining whether a nondomiciliary state might be able to impose a tax on the same property as the domiciliary state, thereby subjecting the taxpayer to the possibility of double taxation, the Court notes that a state may not tax an airplane merely passing over that state. *See Goldberg v. Sweet*, 488 U.S. ___, 109 S.Ct. 582, 589 (1989) *citing Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302-04 (1944) (Jackson, J., concurring) and *United Airlines v. Mahin*, 410 U.S. 623, 631 (1973).[6] None of those cases, however, purported to consider an apportionment issue. Rather, the Court appeared to be stating that the mere fact an aircraft flew over a state, without more (*i.e.*, without that aircraft or the enterprise of which it is a part otherwise having a substantial nexus with the hypothetical taxing state as a result of other contacts with that state) did not create a sufficient nexus to confer taxing power on the overflown state. Oregon does not suggest it could tax overflying aircraft belonging to airlines having no nexus with the state, nor does it seek to tax such airlines. But these petitioners are not those

[6] There is reason to question how much vitality some of petitioners' cases retain after *Complete Auto Transit v. Brady, supra.* For example, *United Airlines v. Mahin*, 410 U.S. at 631, relied on *Helson v. Kentucky*, 279 U.S. 245 (1929). At least one recognized tax law authority has raised cogent questions about *Helson*'s continuing force after *Complete Auto Transit.* HARTMAN, *supra*, § 10:5.

airlines. These petitioners concede they have a sufficient nexus with Oregon to allow it to tax them.

In *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), the Court concluded that eighteen landings per day by the complaining airline was a sufficient nexus to confer taxing power on the State of Nebraska. By emphasizing a portion of the Court's opinion, petitioners appear to suggest the Court concluded the state could apply its tax only to those aircraft that made individual landings in the state. The airlines quote the Court as follows:

> [T]he Court held that "the situs issue devolves into the question whether eighteen stops per day by [Braniff's] aircraft is sufficient contact . . . to sustain . . . an apportioned ad valorem tax *on such aircraft*." 347 U.S. at 600-01.

Pet. Cert. at 8 (emphasis by petitioners). However, as the opening sentence of the opinion makes clear, "[t]he question presented [in *Braniff*] is whether the Constitution bars the State of Nebraska from levying an apportioned ad valorem tax on the flight equipment of appellant, an interstate carrier." 347 U.S. at 591. This description refers to the airline's flight equipment in general, not by reference to whether any particular aircraft landed in the state. Neither the Court's description of the issue nor anything else in the opinion suggests the Court intended to subdivide that flight equipment into those portions of the fleet having an individual nexus with Nebraska and those that did not. Indeed, petitioners have been unable to cite this Court to a single case in which this Court or any other court has concluded or even hinted that each activity a state seeks to include in its apportionment formula must have an individualized nexus with the state even if consideration of that activity leads to manifestly fair apportionment.

It is only by compressing the issues of nexus and apportionment that the airlines find assistance in the cases they

cite. Once the airlines concede that the unit of each petitioners' fleet of aircraft has a situs in Oregon, it becomes evident that principles governing the fair apportionment of taxable property, not principles governing the ability of the state to reach that property, are the principles on which the discussion should center.

Thus, the primary basis of the airlines' claim that this case presents an issue of significance depends in its entirety on petitioners' detour into an issue simply not present in the case. As the following section demonstrates, the real issue in this case, the fairness of the apportionment formula, involves nothing more than a fact-specific application of settled principles.

2. Oregon's apportionment formula is fair.

A state has wide latitute in determining the apportionment formula it will apply to an interstate enterprise having a situs within its borders. *Norfolk & Western Railway Company et al. v. Missouri State Tax Commission*, 390 U.S. 317, 326 (1968). An enterprise challenging such a formula has the heavy burden of showing that the method applied grossly overreaches the values represented by intrastate assets. *Ibid.*[7] The state need not demonstrate that the results yielded are precise valuations of the assets located in the state. *Id.* at 324.

In two cases in which the Court concluded enterprises met this heavy burden, railroads were able to prove that the application of the mileage formula in question resulted in the attribution to the taxing state of far more of the railroads' rolling stock than was actually present in the state at any

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[7] In *Norfolk*, the Court discussed mileage-based formulas for determining the apportionment of railroad rolling stock. Flight time is an essentially direct equivalent for mileage in the apportionment of aircraft "flying stock." That is, if Oregon chose to apportion on the basis of miles flown within the state, it would still include mileage for overflights in its apportionment of petitioners' enterprises. Principles governing mileage-based formulas should be equally applicable to Oregon's time-based formula.

given time. *Norfolk & Western, supra*; *Union Tank Line Company v. Wright*, 249 U.S. 275 (1919). The airlines made no effort to make a similar showing. Rather, they rely almost exclusively on their inapposite claim that overflights have no individualized nexus to the state.

The fairness of the Oregon formula is easily demonstrated. As the Oregon Supreme Court aptly noted, petitioners' aircraft are on the ground or in the air at any given time; DOR's formula simply reflects that fact. *Alaska Airlines, supra*, 307 Or. at 415 (Pet. Cert., Appendix A at 13a). "More precisely, the formula reflected that portion of time each airline's aircraft property spent on the ground or in the air *in Oregon*." *Ibid* (emphasis in original). Petitioners' primary disagreement with the Oregon Supreme Court's determination that the challenged formula is fair inescapably centers on the question whether overflights constitute activity "in Oregon," thus ensuring that including that flight time in the apportionment formula does not result in unfair apportionment. *See* Pet. Cert. at 9-10.

Petitioners erroneously assert the Oregon Supreme Court based its conclusion that these flights were "in" Oregon on the potential application of Oregon's criminal laws to those rights and the possibility of search and rescue assistance for downed planes. Pet. Cert. at 10. While the Oregon Supreme Court did discuss those factors, its reasoning went further.

First, the court noted the airlines did not contend that flight time in Oregon of interstate flights that *did* land in Oregon could not be considered in apportioning the unit's value. The court pointed out that the airlines did not suggest how that time was distinguishable from flying time of planes that overflew the state but did not land. *Alaska Airlines, supra*, 307 Or. at 413 (Pet. Cert., Appendix A at 9a-10a). The airlines similarly make no effort to explain that distinction to this Court. By conceding DOR may properly consider in the apportionment formula flight time of aircraft that do touch

down in Oregon, the airlines highlight their belief the state may only consider activities with individualized nexus to the state in that formula.

The Oregon Supreme Court also asked the obvious question "where an overflight was if not 'in' this state while traveling within the borders of this state." *Ibid.* The elegant simplicity of this question should not obscure its importance or the devastation petitioners' inability to answer it wreaks on their claim. Wherever an airplane flying over Oregon may be, it is unquestionably not "beyond Oregon's borders." *Nashville, C. & St. L. Railway v. Browning*, 310 U.S. 362, 365 (1940). An airplane that flies over Oregon but does not land in the state does not necessarily have its own separate situs in the state. However, that airplane is unquestionably "in Oregon" while within Oregon's borders. If it is one of petitioners' airplanes, it is part of an enterprise with an acknowledged situs in the state. Petitioners seek to deflect attention from this self-evident fact by arguing that Oregon provides no services or benefits to overflying aircraft. Pet. Cert. at 10-12. This argument, like so much of petitioners' claim, is based on the erroneous assertion that Oregon must establish a separate nexus with each flight or aircraft it seeks to include in its apportionment formula.

Factors often cited by the Court demonstrate the fairness of the Oregon formula. First, it is "internally consistent" in that, if applied by every taxing jurisdiction, it would result in no more than 100 percent of the unitary business' property being taxed. *Container Corportion of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). If every state adopted Oregon's time-based formula, each state's taxes would be based only on the time aircraft were on the ground or in the air in that state. Since they cannot be in more than one state at

once, there would be no risk of double taxation.[8]

The tax is also "externally consistent" because, like formulas based on mileage, the time-based formula accurately reflects that proportion of the airline's property located in Oregon. *See Goldberg v. Sweet, supra*, 109 S.Ct. at 590. The court has noted its general approval of mileage-based formulas for apportioning interstate transportation businesses, *e.g.*, *Nashville, C. & St. L. Railway v. Browning, supra*, 310 U.S. at 365 (citing cases), unless the use of that formula produces a grossly distorted result. *See Norfolk & Western Railway Company v. Missouri Tax Comm., supra*, 390 U.S. at 326-27. The airlines have completely failed to make such a showing.

The airlines assert, however, that adoption of Oregon's approach by other states would result in double taxation. Pet. Cert. at 13.[9] They base this conclusion on the assertion that *Goldberg v. Sweet, supra*, would permit the state in which the flight originates or terminates to impose a flat tax on the entire flight. The attempt to equate the telephone signals discussed in *Goldberg* with aircraft flights fails for several reasons. Not the least of those is that *Goldberg* laid great stress on the impossibility of determining the routes by which individual telephone calls went from their point of origin to their destination. 109 S.Ct. at 590. *Goldberg* rejects the possibility of apportionment of interstate telephone calls on practical rather than constitutional grounds. The case therefore

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[8] Even if every state adopted Oregon's formula and apportioned based only on the time aircraft were in that state, the airlines would be undertaxed as they are now. Time flying over a state the airline does not serve, and therefore has no nexus with, and time flying over the ocean to Hawaii, for example, would not be included in the formula.

[9] This claim is patently inconsistent with petitioners' third argument. That argument appears to be that permitting Oregon to consider overflights in its apportionment formula would result in an overall increase in taxes on the airlines by permitting taxation of what is now an untaxable event. *See* Pet. Cert. at 22. If overflights are presently untaxable by the state of domicile or the state where the flight originates or terminates—as opposed to taxable but merely untaxed by those states, an issue of no constitutional significance—double taxation is not an issue.

does not imply, as petitioners suggest, that the Constitution permits only the states where a flight originates or departs to apportion based on that flight.[10] Indeed, the Court expressly noted that where vehicles pass through a state there is no practical or constitutional difficulty in apportionment based on mileage. *Ibid.* As noted earlier, flight miles easily could be substituted for time in the Oregon formula without changing the relative apportionment of petitioners' units. Moreover, because *Goldberg* involved a flat tax, not apportionment, its applicability to this case is further strained.

The only basis for concluding the state of domicile could include air time over Oregon in its apportionment formula, a claim pressed in the Oregon court but muted in the petition, would have to be found in *Northwest Airlines v. Minnesota, supra.* In *Northwest Airlines*, the Court held the state of domicile could tax the full value of the airline's fleet because none of the airline's mobile property had acquired an "actual situs" in any other state. 322 U.S. at 296, fn 2. Property could only acquire "actual situs" by being permanently located in the other state, in which case the second state would acquire sole power to tax. *Ibid.* The three-member plurality and one of the concurring Justices rejected outright the principle of apportionment as applied to airline property. *See* HELLERSTEIN, CORPORATE INCOME AND FRANCHISE TAXES, ¶ 4.10[3] (1983). The fifth Justice declined to reject apportionment in principle. 322 U.S. at 301-02 (Black, J., concurring). Ten years later, the Court approved apportionment in *Braniff Airways v. Nebraska State Board of Equalization and Assessment, supra*, thereby depriving the rationale employed by the *Northwest Airlines* plurality of much of its author-

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[10] While it may be true that the domiciliary state could consider the flight time or mileage over a state with which the airline had no nexus at all, *see* section III, *infra*, that issue is not presented in this case inasmuch as the airlines have a situs in Oregon and Oregon does not seek to consider time over any other state in its formula.

ity. HELLERSTEIN, *supra*, at 133. Thus, there is no support for claiming the domicile state could apportion based on time or mileage over Oregon or over any other state having a substantial nexus with the enterprise.

Moreover, it is insufficient simply to assert a risk of multiple taxation. Rather, a complaining taxpayer must present proof of actual cumulative taxation by more than one state. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 276 (1978). Petitioners have presented no evidence that any other state actually seeks to tax their property by reference to flight time over Oregon. As in *Moorman*, the taxpayers' claim is mere speculation. *See* 437 U.S. at 276.

Thus, Oregon's formula is internally and externally consistent, it does not lead to double taxation and petitioners have not shown that it leads to taxation in excess of the airlines' intrastate activity. Petitioners' persistent efforts to focus the argument on nexus only serve to emphasize their complete failure to present any evidence to establish that application of the challenged formula leads to disproportionate taxation of their mobile property by Oregon. *See, e.g., Norfolk & Western Railway Co. v. Missouri State Tax Commission, supra.* Nor could they do so, because the Oregon formula is fair.

3. The Oregon formula does not discriminate against interstate commerce.

Petitioners argue that including flyover time in the apportionment formula discriminates against interstate commerce generally and against some carriers in interstate commerce as opposed to others. The airlines did not raise this issue in the Oregon Tax Court or Supreme Court, nor was it decided by those courts. *See Alaska Airlines v. Department of Revenue*, 307 Or. at 413-14 (Pet. Cert., Appendix A at 11a)[11]; *Alaska*

[11] After setting out the four-part Commerce Clause test of *Complete Auto Transit*, which includes non-discrimination against interstate commerce, the court stated:

(Footnote continued on next page)

Airlines Inc. v. Department of Revenue, 10 Or. Tax 518 (1987) (Pet. Cert., Appendix B at 17a); Appellant's Brief and Abstract of Record, Oregon Supreme Court No. S34860, pp. 24-32. Because the airlines did not raise this claim below, DOR had no opportunity to make a record on the issue and the state courts neither considered nor decided this claim of discrimination against interstate commerce. This Court generally does not consider a claim raised for the first time on appeal to this Court, *see* 28 U.S.C. § 1257(a) (1988); *Steagald v. United States*, 451 U.S. 204, 208 (1981), and it should not do so in this case.

However, even if the Court were to consider this claim, it is without merit.

> [I]n the interstate commerce context . . . the anti-discrimination principle has not in practice required much in addition to the requirement of fair apportionment . . . a fairly apportioned tax [will] not be found invalid simply because it differ[s] from the prevailing approach adopted by the States.

Container Corporation of America, supra, 463 U.S. at 171. Like much of petitioners' argument, the discrimination claim depends on petitioners' constant attempts to focus the inquiry on individual flights or aircraft. Because that focus is misdirected, petitioners' argument is incorrect. Oregon apportions *all* mobile airline property that has a situs in Oregon, whether it belongs to an interstate or an intrastate airline, for all flight time within Oregon's borders. Applying petitioners' logic, Oregon discriminates against intrastate airlines because it taxes *all* of their flight time, but only a portion of the flight time of interstate airlines.

(Footnote continued from previous page)

> [The airlines] argue that the 1986 taxes were not applied to activities with a substantial nexus with this state, fairly apportioned or fairly related to services provided by this state.

307 Or. at 414; Pet. Cert., Appendix A at 11a.

The suggestion that Oregon discriminates in favor of those airlines having no landings in Oregon is similarly meritless. Oregon cannot tax an interstate business that has no situs in Oregon. Thus, the fact Oregon taxes petitioners while it does not tax airlines with no nexus with Oregon is not a consequence of state action or policy choice. Rather it is the product of petitioners' choice to do business in Oregon and the choice of other carriers to concentrate their activity elsewhere.

4. The Oregon tax is fairly related to services provided by the state.

In *Commonwealth Edison Company et al. v. Montana*, 453 U.S. 609 (1981), the Court refined this prong of the *Complete Auto Transit* test. The Court noted this part of the test is "closely connected" to the first prong—the requirement of nexus with the taxing state. 453 U.S. at 625-26. The Court expressly rejected any suggestion the taxes must be reasonably related to the value of services provided to the activity or that the mere amount of the tax would render it constitutionally suspect. 453 U.S. at 623-25. Rather, the taxing state may require the taxpayer to shoulder its "fair share" of the state's general revenue requirements. 453 U.S. at 626-27. Noting that Montana's 30 percent coal severance tax was measured by a percentage of the value of the coal taken, the Court had no difficulty concluding the tax was in "proper proportion" to activities in the state. *Ibid.* The same reasoning applies with equal force to the Oregon tax. The apportionment passes muster under this prong of the Commerce Clause test because Oregon bases that apportionment squarely on petitioners' activities within the state.

B. The Due Process Clause.

The airlines' Due Process argument is limited to the same faulty claim that permeates the rest of their argument: the erroneous assertion that each separate flight or aircraft must have its own nexus with Oregon before DOR may consider its activities in the apportionment formula. For the same rea-

sons the formula does not offend the Commerce Clause, it passes Due Process muster. The property being taxed, the unit of the airlines' mobile property, has a situs in Oregon. The basis for the challenged apportionment is presence within Oregon's borders. As a result, Oregon's system does not project its taxing power beyond its borders and it therefore does not offend the Due Process Clause.

II. THE CASES ON WHICH PETITIONERS RELY DO NOT DEMONSTRATE A CONFLICT AMONG THE LOWER COURT DECISIONS.

Petitioners assert that lower courts are in conflict on this issue, and they cite *Northwest Airlines, Inc. v. State Tax Appeal Board*, 720 P.2d 676 (Mont. 1986) and *Blangers v. Department of Revenue and Taxation*, 763 P.2d 1052 (Idaho 1988). Neither case supports petitioners' assertion.

Northwest Airlines, Inc. v. State Tax Appeal Board, is an income tax case. The Montana court decided it solely by reference to Montana statutes. Although the court concluded that overflights were not "in" Montana, it did so as a matter of state statutory interpretation. The court held only that the Montana statute granting authority to apportion based on business activity "in this state" was not intended to reach overflight activity. 720 P.2d at 677-78. The court expressly declined to address whether such taxation violated the state or federal constitutions. 720 P.2d at 678. The concurring justice left no doubt the case was decided solely as a matter of interpreting the will of the Montana Legislature by pointedly noting that using overflight mileage in determining an airline's income taxes

> is neither illegal nor unfair; and that the legislature and the department of revenue may well consider such a factor as they revamp their laws and regulations to cover the hole in the income tax law pointed out in this Court's opinion.

720 P.2d at 679 (Sheehy, J., concurring).

Like so much of the authority on which petitioners rely, *Blangers v. Department of Revenue & Taxation*, *supra*, addresses nexus, not apportionment. The tax the court considered was an income tax levied against employees of a railroad that passed through Idaho without stopping there. Applying the *Complete Auto Transit* factors, 763 P.2d at 1056, 1069, the court concluded those employees had insufficient nexus to Idaho to render them subject to Idaho income taxation. 763 P.2d at 1055, 1070-71. The court's dictum referring to overflight merely illustrated the lack of nexus an overflying businessman, as opposed to an overflying airplane, would have with the State of Idaho. *Id.* at 1071. The court neither stated nor purported to state a principle relevant to apportionment of taxes for an entity with an admitted nexus with the taxing state.

Neither of these cases conflicts with Oregon's determination that overflight time of airplanes belonging to an airline with a situs in Oregon is a fair part of the apportionment of that airline's property or with the state decisions cited by petitioners agreeing with that conclusion. *See* Pet. Cert. at 17.

III. PETITIONERS' CLAIM THAT APPLICATION OF OREGON'S APPORTIONMENT FORMULA DOES OR WILL CAUSE OVERTAXATION OF AIRLINES IS INCONSISTENT WITH THEIR OTHER ARGUMENTS AND RAISES NO CONSTITUTIONAL ISSUE.

Petitioners' final argument is nothing more than a complaint the airline industry is taxed too heavily. That complaint presents no constitutional issue; it is properly addressed to Congress and not to this Court. *See, e.g.*, Section 306 of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (1982) (providing tax relief to railroads).

Petitioners appear to suggest *no* state would be able to consider their flight time over Oregon or other states in which